Supreme Court, U.S.
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No. 93-1673

In The

Supreme Court of the United States

October Term, 1993

MILAN CHONICH AND CARMEN PASCARETTI,

Petitioners,

v.

WAYNE COUNTY COMMUNITY COLLEGE and JUANITA FORD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN RESPONSE TO PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID PETITIONERS IMPROPERLY ATTEMPT TO USE THE MOTION TO DISQUALIFY THE DISTRICT JUDGE TO NULLIFY THE DISTRICT JUDGE'S GRANT OF A MOTION DISQUALIFYING PETITIONERS' COUNSEL WHEN AN APPEAL OF THE GRANT OF THAT MOTION COULD NOT BE HAD ON AN INTERLOCUTORY BASIS?

II. DID PETITIONERS ESTABLISH FACTS SHOWING BIAS THROUGH TIMELY AND SUFFICIENT AFFIDAVITS OR OTHERWISE REQUIRING THE DISQUALIFICATION OF THE DISTRICT JUDGE PURSUANT TO 28 U.S.C. §144; 455?

LIST OF PARTIES

The caption of the case contains all of the parties to the litigation; the Honorable Nancy G. Edmunds of the Eastern District for the Southern District of Michigan is also listed as a Respondent in proceedings before the United States Court of Appeals – Sixth Circuit.

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OPINIONS BELOW

1. Unpublished Opinion and Order dated May 27, 1993 from District Court Judge Nancy Edmunds, Denying Plaintiffs' Motion for Reconsideration and Denying Plaintiffs' Motion to Disqualify the Judge (Res. App., p 16)

2. Unpublished June 2, 1993 Order from District Court Judge Nancy Edmunds Partially Vacating May 27, 1993 Order (Res. App., p 31)

3. Unpublished Opinion and Order dated June 11, 1993 from District Court Judge Nancy Edmunds Denying Motion for Reconsideration and/or Rehearing of May 27, 1993 and June 2, 1993 Orders (Res. App., p 33)

4. Unpublished June 18, 1993 Opinion and Order from District Court Judge Nancy Edmunds Denying June 11 Motion for Reconsideration and/or Rehearing of May 27, 1993 and June 2, 1993 Orders as Moot (Res. App., p 35)

5. Unpublished July 8, 1993 Opinion and Order from District Court Judge Lawrence P. Zatkoff Denying plaintiff's Motion to Disqualify Judge Nancy G. Edmunds (Res. App., p 38)

6. Unpublished September 30, 1993 Opinion and Order from the United States Court of Appeals for the Sixth Circuit Denying Petitioners' Petition for Writ of Mandamus (Pet. App., p A-6)

7. Unpublished December 28, 1993 Opinion and Order from the United States Court of Appeals for the Sixth Circuit Denying Petitioners' Motion for Rehearing (Pet. App., p A-14)

STATEMENT OF THE CASE

Petitioners are a current and former administrator of Respondent Wayne County Community College ("the College"). The Petitioners' suit against the College and Respondent, Juanita Ford ("Ford") alleges reverse race discrimination and defamation under various state and federal civil rights statutes and Michigan law relative to defamation. The case was tried in 1987 and, after reversal, in 1990 before the Honorable Horace Gilmore. A second appeal resulted in reversal for retrial on a very narrow issue: Petitioners' entitlement, if any, only to non-economic loss damages for retaliation under Michigan's Civil Rights Act, MCL 37.2101, et seq.

Petitioners contend that the current trial judge, the Honorable Nancy Edmunds, must be disqualified because she allegedly demonstrated bias by indicating she had heard about the case from Judge Gilmore and because she granted a Motion disqualifying Petitioners' counsel for conflict of interest. Petitioners contend that once affidavits are filed pursuant to 28 U.S.C. §144 the Judge has no discretion and must recuse him or herself from further proceedings.

Respondent's contention is that Petitioners' Motion to disqualify lacks merit factually and is improper as a matter of law because the Motion was not timely and was not based on affidavits which were timely or sufficient. Further, Respondent contends Petitioners are improperly using the Mandamus process to appeal Orders which are not final and not subject to interlocutory appeal.

FACTUAL BACKGROUND

A. The Nature of the Action Below

Petitioners are a current and former administrator at Wayne County Community College. Petitioner Carmen Pascaretti held various positions within the administration, generally in the data collection and processing areas. Milan Chonich has held various positions within the administration and is currently the dean of the downtown campus. In 1984 Petitioners filed suit in Wayne County Circuit Court alleging they had been defamed by a letter written by Respondent Juanita Ford in February 1994. The letter dealt with possible adverse effect on women and blacks by budget cuts which were proposed for the school and named various white administrators, Petitioners among them. In 1985 Petitioners filed a Complaint in Federal Court which was assigned to the Honorable Horace Gilmore. That Complaint alleged Title VII violations, violations of the Michigan Elliott Larsen Civil Rights Act, MCL 37.2101, et seq., various civil rights violations and intentional infliction of emotional distress. The Wayne Circuit case was dismissed and the defamation claims added to the Federal case before trial which occurred in 1987. The defamation claims were dismissed before the case went to the jury. The jury found in favor of Plaintiffs. That verdict was reversed on appeal to the United States Court of Appeals for the Sixth Circuit in part due to the excessiveness of the verdict, the Court's dismissal of the defamation claims and questions the Sixth Circuit had with respect to the instructions which were given on the civil rights counts. The case was remanded with the option to retry all liability issues,

which occurred in 1990. The jury did find liability against Mrs. Ford for defamation and liability against the College for retaliation under the Elliott Larsen Civil Rights Act only but awarded no damages. No liability was found on any other count of the Complaint and a judgment was entered for no cause of action. The case was again appealed to the Sixth Circuit. Despite the fact that the issue was never preserved for appeal because Petitioners never raised the issue below, it was never briefed or argued and despite the fact that Judge Gilmore did give a general damage instruction on noneconomic loss damages, the Sixth Circuit remanded for a new trial on the sole issue of noneconomic loss damages for retaliation under the Elliott Larsen Civil Rights Act, MCL 37.2101, et seq., finding the Court had not specifically instructed that such damages could be awarded under the Act.

During the pendency of the appeal Petitioners' counsel sought to disqualify Judge Gilmore, alleging he was biased against Petitioners' counsel for reasons wholly unrelated to the case. The issue was raised to the Sixth Circuit via a Motion for a new trial judge which the Court denied by an Order issued February 21, 1991 on the basis that the Motion was "inappropriate, improper and shows a total lack of understanding of the rules of practice".

However, Judge Gilmore subsequently disqualified himself by a June 11, 1992 Order which stated, "pursuant to 28 U.S.C. §455 I hereby disqualify myself from the above styled case". The case was reassigned to the Honorable Nancy G. Edmunds who scheduled a pre-trial conference for July 23, 1993. The case was generally discussed at that time but Judge Edmunds took no action on the case because Motions for rehearing were still pending

before the Sixth Circuit. Respondents specifically contest any allegation by Petitioners that Judge Edmunds was at all hostile to Petitioners' counsel or took any action showing bias one way or the other about the case.

B. Proceedings Relative to Motion For Disqualification of Petitioners' Counsel and Motion for Disqualification of Judge Edmunds

By the time the next pre-trial conference was scheduled, in December, 1992 after the case finally came back from the Sixth Circuit, Petitioners' counsel had been elected to the Board of Trustees of Wayne County Community College. Counsel for the College raised the issue of her disqualification at the December pre-trial and counsel for Petitioners refused to disqualify herself, after which a Motion for disqualification was filed. The Motion was argued before Judge Edmunds on May 5, 1993. Judge Edmunds granted the Motion and on May 11, 1993 entered an Order providing Petitioners 30 days to find new counsel unless Petitioners' counsel resigned from the Board of Trustees.

Petitioners filed a Motion for Reconsideration of Petitioners' counsel's disqualification and also filed a Motion to disqualify Judge Edmunds based on 28 U.S.C. §144 and §455. The basis for the Motion was that Judge Edmunds was biased because she had made comments at the July 23, 1992 pre-trial indicating she had allegedly discussed the case with Judge Gilmore who Petitioners contended had disqualified himself for bias and that this was an improper ex parte communication. The fact that the Court

disqualified Petitioners' counsel was also raised as a basis for the Motion for Disqualification.

By Order dated May 27, 1993 Judge Edmunds denied both Motions (Res. App., p 16). On June 2, 1993 Judge Edmunds on her own Motion issued an Order vacating the portion of the May 27 Order denying Petitioners' Motion to disqualify the Judge and ordered that the Motion to disqualify be heard by another judge in the circuit; it was subsequently assigned to Judge Zatkoff. Petitioners filed a Motion for Reconsideration of both the May 27th and June 2nd Orders alleging that because affidavits had been filed in support of the Motion to Disqualify, Judge Edmunds had no discretion to continue to act in the case and was required to assign the entire case to another judge for further proceedings. Petitioners took the position that the Judge had accepted their affidavits as timely and sufficient and therefore could proceed no further with the case. The June 11th Order issued by Judge Edmunds denying the Motion for reconsideration or rehearing of the May 27th and June 2, 1993 Orders specifically found that Judge Edmunds did not pass judgment on whether the affidavits were filed in good faith, were timely or were sufficient but merely exercised her discretion in ordering reassignment under the rule that reassignment is permissive citing *Parker v Sill*, No. 92-1158, 1993 App, Lexis 6922 (6th Cir., March 25, 1993) construing 28 U.S.C. §144 and citing *U.S. v Azhocar*, 581 F.2d 735 (9th Cir. 1978), cert. den., 440 U.S. 907 (1979) among others (Pet. App., p A-18). Petitioners filed another Motion for reconsideration which Judge Edmunds denied by another Order entered June 18, 1993 again indicating she did not rule on the timeliness or

sufficiency of the affidavits provided by Petitioners (Res. App. A 33). Judge Zatkoff considered the Motion for Disqualification on briefs and on July 8, 1993 issued his Opinion, finding that Judge Edmunds was not disqualified from the case (Res. App., p 38). Judge Zatkoff found that the affidavits submitted by Petitioners were not timely and sufficient, first because the Motion to Disqualify was not filed until over 10 months after Judge Edmunds had the case and after the alleged improper comments at the July 1992 pre-trial. The Court found the affidavits were not sufficient because they were not made on personal knowledge. The Court also found that there was no evidence of bias stemming from an extrajudicial source and found there was no basis to Petitioners' contention that a discussion with another judge was an ex parte communication of an extrajudicial nature. Further, the Court found the Motion was untimely because it was not made until after Judge Edmunds disqualified petitioners' counsel. The Court found that any opinions expressed by Judge Edmunds in connection with Petitioners' disqualification were learned from her participation in the case and did not constitute an extrajudicial source, in addition to no evidence of bias. The Court found that pursuant to §455 Petitioners had not demonstrated any reasonable factual basis for doubting Judge Edmunds' impartiality in the action.

C. Appellate Proceedings

Petitioners filed a Petition for a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit and a request for stay of proceedings. By Order filed September 30, 1993, the United States Court of Appeals

for the Sixth Circuit denied the Petition, specifically finding there was no merit to Petitioners' contention that the District Court Judge was obligated to transfer the entire case to another judge because she had implicitedly found the affidavits in support of the disqualification timely and sufficient (Pet. App., p 6-8). In a concurring opinion Judge Wellford agreed the Petitioners' arguments were "based on a strained reading of the federal statutes governing the recusal of district judges, 28 U.S.C. §144" (Pet. App., p A-11). Judge Wellford went on to suggest that the Court should have held an evidentiary hearing before disqualifying Petitioners' counsel (Pet. App., p A-12).

On remand from the Sixth Circuit Judge Edmunds entered an Order on October 8, 1993 to the effect that due to Judge Wellford's concurrence, she was going to reconsider the College's Motion to disqualify Petitioners' counsel and ordered an evidentiary hearing on the issue. Meanwhile, Petitioners moved for reconsideration of the denial of their Petition for Mandamus in the Sixth Circuit and the trial Court stayed the proceedings in the District Court pending that Motion for Reconsideration. That Motion was denied by an Opinion and Order issued December 28, 1993 (Pet. App., pp A-14-17).

A full evidentiary hearing on the issue of Petitioners' counsel's disqualification was held March 29, 30 and 31, 1994. The trial court took the Motion under advisement pending review of the transcript which was filed on or about May 26, 1994 and a further submission by counsel.

Petitioners originally filed their Petition for Certiorari to this Court on May 28, 1994. A Motion for Stay of

Proceedings regarding the evidentiary hearing was denied and the case still proceeds in District Court.

REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioners are using court process improperly to attempt to derail efforts to disqualify Petitioners' counsel. Petitioners have no appeal of right from the order to disqualify their counsel because it is interlocutory in nature; *Richardson-Merrell, Inc. v Koller,* 472 U.S. 424 (1985). They hope to eliminate the problem by eliminating the Judge. Moreover, Petitioners' Motion to disqualify Judge Edmunds was fatally defective because it was not factually supported; there was no competent evidence of bias on the part of Judge Edmunds toward them as required by 28 U.S.C. §144 or §455. The Sixth Circuit properly denied Mandamus.

Petitioners assert that a Judge must disqualify himself or herself from a case if the party seeking disqualification files a timely and sufficient affidavit of bias against a party. Petitioners never gave this Court the affidavits that were filed nor did they give this Court Judge Zatkoff's opinion ruling on the timeliness or sufficiency of the affidavits. As Judge Zatkoff noted, the affidavits were neither timely nor sufficient and were not based on personal knowledge. (Affidavits Res. App., pp 1, 9 and Zatkoff Opinion, Res. App., pp 38, 43-46).

Moreover, on their face the affidavits do not indicate any bias by Judge Edmunds against Petitioners. If this Court accepts Petitioners' position, then chaos in the

courts would result because judges would be disqualified right and left by the mere filing of speculative, unsubstantiated affidavits.

A. Petitioners Are Improperly Attempting to Use the Appellate Process, Both Before the Court of Appeals, and this Court, to Block Efforts to Disqualify Petitioners' Counsel for a Clear Conflict of Interest

Simply put, Petitioners are attempting to disqualify Judge Edmunds on a wholly inadequate basis, not, we would submit, because there is any evidence of bias, but to prevent Judge Edmunds from considering the issue of Petitioners' counsel's disqualification. This Petition is really in the nature of an interlocutory appeal on the issue of Petitioners' counsel's disqualification; it is clear that the disqualification of Petitioners' counsel cannot be raised by an interlocutory appeal or via a Petition for Writ of Mandamus. Normally, mandamus would only be available in unusual situations where Petitioners can show a clear and indisputable right to the relief sought. *In Re American President Lines Ltd.*, 929 F.2d 226, 227 (6th Cir.) (Order). As the Sixth Circuit noted in its September 30th and December 28th Opinions, issues relating to the disqualification of Petitioners' counsel are interlocutory in nature and are not collateral orders subject to appeal as final judgments within the meaning of 28 U.S.C. §1291. Therefore, the May 11, 1993 Order entered by Judge Edmunds was not a collateral Order subject to immediate appeal. Assuming the Court issues a similar Order subsequent to the evidentiary hearing, which Respondents believe is highly likely, such Orders will not be subject to

appeal as of right or by Writ of Mandamus. See *Richardson-Merrell, Inc. v Koller*, 472 U.S. 424, 472 (1985) where the Court held:

> As the Court noted in *Firestone*, the final judgment rule promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment. *Ibid; Flanagan v United States*, 465 U.S., at 263-264. Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay and expense. It would also undermine the ability of district judges to supervise litigation. In §1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States v Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Judge Edmunds has just concluded a full and fair hearing on the issue of Petitioners' counsel's disqualification. While that issue is not before this Court, Respondent submits that the evidence was overwhelming that Petitioners' counsel cannot sit as a trustee of Wayne County Community College, charged with the duties and obligations of a trustee toward the school and at the same time act as Petitioners' attorney suing the school for a money judgment which Petitioners' counsel testified could be in the millions of dollars without an irreconcilable conflict

of interest which requires that she either disqualify herself as counsel or resign from the Board of Trustees. If the District Court disqualifies Petitioners' counsel, the issue of the propriety of that disqualification can be raised at the close of the case. As *Richardson-Merrell, Inc. v Koller, supra,* suggests, the purpose of requiring Orders to be final before they can be appealed is to avoid piecemeal litigation and unwarranted delays. This case presents a very clear example of how misuse of the system by Petitioners and their counsel leads to unwarranted delay and imposition on the resources of the Courts for improper purposes. Judge Edmunds ruled on Petitioners' counsel's disqualification by Order entered May 11, 1993. Through the series of maneuvers described in the factual statement, it is now May 1994, the issue of the disqualification of Petitioners' counsel is still not resolved, and the case has not moved forward since the remand from the Sixth Circuit in 1993.

B. Petitioners Present No Valid Factual Basis for the Disqualification of Judge Edmunds

Petitioners' position is that once affidavits of bias are filed in support of a Motion to disqualify a judge pursuant to 28 U.S.C. §144, those affidavits require that the Court disqualify itself from any further participation in the case. Alternatively, they argue that Judge Edmunds accepted the timeliness and sufficiency of the affidavits when she ordered the Motion to disqualify reassigned to another Judge. The Petitioners further contend that the alleged ex parte communication Judge Edmunds had with Judge Gilmore about the case represents information

from an extrajudicial source and is evidence of actual bias. This argument ignores the law and distorts the facts.

The specific problem with Petitioners' position is that they assume that a finding has been made that the affidavits in support of the Motion for disqualification were timely and sufficient as required under the rule and that sufficient facts were presented to establish bias on the part of the Judge which was extrajudicial in nature. That assumption is wrong.

28 U.S.C. §144 and 28 U.S.C. §445 govern the disqualification of a trial judge. Under either statute a Motion to disqualify must be timely. *Willner v University of Kansas,* 848 F.2d 1023 (10th Cir. 1988), citing *Singer v Wadman,* 745 F.2d 606 (10th Cir. 1984), cert. den., 470 U.S. 1028, 105 Sup. Ct. 1396, 84 L. Ed. 2d 785 (1985). Where both statutes are cited in support of a Motion they should be considered in pari matria, *City of Cleveland v Krupansky,* 619 F.2d 576, 578 (6th Cir. 1980).

Section 144 requires an affidavit of bias and prejudice which must be timely, sufficient, made by a party, and accompanied by a certificate of good faith by counsel. The affidavit is construed strictly against the party seeking recusal and is insufficient if it merely states conclusions, rumors, beliefs and opinions; *Glass v Pfeffer,* 849 F.2d at 1261 (10th Cir. 1988) citing *Hinman v Rogers,* 831 F.2d (10th Cir. 1987). The test under §455 is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the Judge's impartiality; *Glass,* 849 F.2d at 1269; *Hinman,* 831 F.2d at 398.

The conduct or behavior of the trial judge at issue must be extrajudicial in nature and not arise through the

Court's knowledge of the case at issue; *City of Cleveland v Krupansky, supra* at 578; *Davis v Board of School Commissioners of Mobil County,* 517 F.2d 1044 (10th Cir. 1975).

Under §144 a District Judge must examine the affidavits to determine whether they are timely and legally sufficient; *Easley v University of Michigan Board of Regents,* 853 F.2d 1351, 1355 (6th Cir. 1988) (quoting *In Re City of Detroit,* 828 F.2d 1160, 1164, Note 2 (6th Cir. 1987)). See also *Marty's Floor Covering Company, Inc. v GAF Corporation,* 604 F.2d 266 (1979); citing *U.S. v Nehas,* 368 F. Supp., 435, 437 (W.D. Penn. 1973) which stated that the filing of an affidavit itself does not automatically effect the Court's ouster. Instead, the legal sufficiency of the facts alleged (as distinguished from conclusionary assertions) must be passed upon by the reviewing judge.

As it relates to the foregoing, Petitioners' Petition contains irrelevant and misleading statements. For example, Petitioners begin by a discussion of what allegedly occurred when Judge Horace Gilmore was the presiding judge. This is irrelevant. In addition, Petitioners allege that they successfully requested that Judge Gilmore disqualify himself due to his prejudice and bias in the matter, to set the stage for their contention that any communication Judge Gilmore had with Judge Edmunds must necessarily have biased her against Petitioners. These statements are irrelevant, inaccurate and misleading because although the U.S. Court of Appeals for the Sixth Circuit on February 21, 1991 denied Petitioners' Motion for substitution of Judge Gilmore because it was "inappropriate, improper and shows a total lack of understanding of the rules of practice" Judge Gilmore subsequently disqualified himself. However, his June 11,

1992 Order regarding disqualification of Judge merely provides that: "[P]ursuant to 28 U.S.C. §455 I hereby disqualify myself from the above styled case". Because 28 U.S.C. §455(a) provides that "[A]ny judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, Judge Gilmore may have disqualified himself because of the appearance of impartiality as opposed to actual prejudice or bias and Petitioners' statement that he was a biased judge disqualified for bias is simply inaccurate and not factually supported.

Petitioners next contend that on July 23, 1993 they became aware of an alleged improper ex parte communication between Judge Edmunds and Judge Gilmore. The comment that the Petitioners quote indicates Judge Gilmore briefed Judge Edmunds, who was taking over as presiding judge on the case, concerning the case. Discussions with other judges are not a basis for disqualification. *Re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3rd Cir. 1985), cert. den., 475 U.S. 1082, 89 L. Ed. 2d 717, 106 Sup. Ct. 1460 (1986).

Petitioners then ignore the fact that after Judge Edmunds ordered that the consideration of the Motion for disqualification be reassigned to another judge, Judge Zatkoff considered the Motion and denied it by Opinion and Order dated July 8, 1993 (Res. App., p 38). Judge Zatkoff made specific rulings on each of Petitioners' contentions.

The Court specifically found that Petitioners' request for disqualification under 28 U.S.C. §144 was not only untimely but legally insufficient. The Motion was

untimely because Petitioners waited over 10 months to file a Motion to disqualify Judge Edmunds based on comments that she allegedly made at the July 23, 1992 status conference and over 20 days after Judge Edmunds allegedly made comments at the May 5, 1993 argument on the Motion to disqualify Petitioners' counsel. The Court found this delay made the Motion untimely, citing *Apple v Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2nd Cir. 1987), *Perkins v Spivey*, 911 F.2d 22, 33 (8th Cir. 1990), cert. den., 111 Sup. Ct. 1309 (1991), *Crowder v Conlan*, 740 F.2d 447, 453 (6th Cir. 1984).

Moreover, the Court found the affidavits submitted in support of the Motion to be legally insufficient. First, Petitioners were not at the status conference where the alleged comments by Judge Gilmore were mentioned and thus the affidavits were not made based on personal knowledge. Furthermore, the Court decided that the comments that Judge Edmunds made during the May 5, 1993 hearing did not reveal a bias or prejudice on the part of Judge Edmunds: "After a review of the entire transcript of the May 5, 1993 hearing this Court can state confidently that Judge Edmunds was not commenting on the merits of plaintiff's case, rather Judge Edmunds was merely trying to explain to Plaintiffs' counsel why she, Judge Edmunds, believed a conflict of interest existed in the case at bar. Such actions are completely proper" (Zatkoff Opinion, Res. App., p 46, citing *United States v Lopez*, 944 F.2d 33, 37 (1st Cir. 1991). Judge Zatkoff indicated there were no facts establishing that the comments of the Judge emanated from a source other than the Court's participation in the case: "Therefore, the May 5, 1993 ruling neither came from an extrajudicial source nor

resulted in an opinion on the merits on some basis other than what Judge Edmunds learned from her participation in the case". (Res. App., p 47).

A cursory review of the affidavits signed by Dr. Chonich and Mr. Pascaretti fully supports Judge Zatkoff's determination. They are identical right down to the typographical errors, are self-serving and replete with conclusions, rumors, hearsay, speculation, innuendo and personal opinion. There are no facts stated which establish actual prejudice by Judge Edmunds against either Dr. Chonich or Mr. Pascaretti.

Further, adverse rulings by the Court are not in themselves grounds for disqualification. *Glass*, 849 F.2d at 1268; *Woodruff v Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979); *Willner*, 848 F.2d at 1028, both citing *United States v Bray*, 548 F.2d 851 (10th Cir. 1976). Clearly, the main thrust of Petitioners' Motion is the allegedly improper action of Judge Edmunds in disqualifying Petitioners' counsel for a clear conflict of interest. The Motion to disqualify should not be used as an avenue to attack adverse rulings made in a case; *Glass*, 849 F.2d at 1268.

Petitioners contend Judge Edmunds' alleged discussions with Judge Gilmore were improper and were somehow evidence of bias, warranting disqualification. They rely on the Code of Judicial Conduct, Canon 3(4). That canon provides that a judge should not have ex parte communications with the litigants or their attorney. It says nothing about discussions with the judge assigned to hear a transferred case. Finally, even if believed, bias or prejudice toward an *attorney* representing a party is not personal bias sufficient to disqualify the judge; *Souder v*

Owens-Corning Fiberglass Corporation, 939 F.2d 647 (8th Cir. 1991). Petitioners have, or more to the point, their counsel has, created an elaborate conspiracy theory which requires this Court to believe that counsel's activities with respect to a wholly unrelated matter so incensed Judge Gilmore, who had no participation in the unrelated matter that he became prejudiced against Petitioners and their counsel, treated Petitioners poorly at the second trial in the case and then disqualified himself for bias before retrial after the second trial. Then we are asked to believe that Judge Gilmore conveyed information to Judge Edmunds which Judge Edmunds accepted and acted upon to Petitioners' detriment, particularly by granting a Motion to disqualify Petitioners' counsel for a blatant conflict of interest. Merely reciting the proposition illustrates how ludicrous it is. Petitioners have presented this Court with an incomplete record which leaves out essential rulings and have misstated the facts. Petitioners did not even give the Court the affidavits upon which they rely in support of their fatally flawed Motion. It is no wonder that the Sixth Circuit did not even request that Respondent file a reply to the Petition for Mandamus which was fatally flawed from the outset. This Petition is a monumental waste of time for these litigants and this Court. Sanctions should be imposed for its filing.

CONCLUSION

The Petition should be denied.

Respectfully Submitted,

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Dated: June 3, 1994

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILAN CHONICH and CARMEN PASCARETTI,

Plaintiffs,

v.

WAYNE COUNTY COMMUNITY COLLEGE and JUANITA FORD, jointly and severally,

Defendants.

85-CV-71172-DT
Hon. Nancy Edmunds

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Farmington Hills, MI 48333-3040

_____/

PLAINTIFFS' AFFIDAVITS OF PREJUDICE AND BIAS AND CERTIFICATE OF ATTORNEY AS TO GOOD FAITH

AFFIDAVIT OF DR. MILAN CHONICH

STATE OF MICHIGAN)
) ss:
COUNTY OF WAYNE)

Dr. Milan Chonich, being duly sworn, deposes and says, that he is a Plaintiff in Case number 85-71172-DT in the Federal Court for the Eastern District of Michigan.

1. That he was present in his attorney's office on the last day of trial in CHONICH II, when Judge Michael Talbot called and spoke over his attorney's speaker phone.

2. That he heard Judge Michael Talbot say that he had had lunch with Judge Horace Gilmore, ("I hear old Horace is giving you a rough way to go"), and that Judge Gilmore indicated he hated the case and wanted Plaintiffs to lose.

3. Judge Talbot indicated that Judge Gilmore believed one of the jurors was opposed to Plaintiffs, stating: "Gilmore says the guy from Ford Motor Company doesn't buy the Plaintiffs' claims".

4. The Judge had forced Plaintiffs to go with all eight jurors, and would not permit Plaintiffs to excuse the two alternates. Prior to the Talbot phone call, this Plaintiff was extremely disturbed and puzzled by this obvious prejudicial ruling.

5. That this phone call also explained the prejudice and bias of the Court and its bizarre rulings throughout the trial. It was clear there was a serious problem with the Court throughout the trial, but, prior to the Talbot phone call, Plaintiffs could not prove that the outrageous behavior was linked to prejudice and bias, or an extrajudicial source, there being the possible alternative explanation that the Judge's poor health interfered with his ability to think clearly and rationally.

6. This affiant's fear of bias and prejudice stems from comments made in 1987 and 1988 by attorneys Albert Lopatin and Sheldon Miller, who are under state bar and federal investigation. The attorneys claimed that they were responsible for Judge Gilmore's federal appointment and indicated that they had a close friendship with the Judge.

7. That in 1989, Plaintiffs' counsel became a key witness in a scandalous federal investigation involving the corruption of high ranking Judges, known locally as the Bronson, Lopatin and Maher scandal.

8. That after the Talbot phone call, Plaintiff was convinced that the Court was prejudiced and biased against him and requested that the Judge disqualify himself.

9. The Judge disqualified himself and the case was reassigned to Judge Edmunds.

10. That on or about July 23, 1992, Plaintiffs' counsel called affiant after her status conference with Judge Edmunds. Plaintiff's counsel indicated that the Judge was very negative and hostile toward plaintiffs, and that the

Judge stated to Plaintiffs' counsel that she had been "fullybriefed" on this case by Judge Gilmore, and that she had had "lengthy discussions" with him.

11. That Plaintiffs' counsel expressed her concern over this ex parte conversation, indicating that it may be unethical and may have tainted the Judge against the plaintiffs.

12. That this ex parte conversation with a prejudiced and biased Judge, certainly gives this plaintiff/affiant cause to question Judge Edmund's impartiality. That the conduct of the Court on May 5, 1993 clearly prejudiced me and my right to have the counsel of my choice. That the comments of the Court on May 5, 1993, (It's not in the College's interest to pay one cent in this . . . "T. 14), were so biased and prejudicial that it proves a predisposition and prejudice against this affiant and clearly impedes affiant from having any possible chance of obtaining counsel.

13. That this plaintiff was fully informed of his counsel's Trustee position and her fiduciary duties and obligations. That it was clear to this plaintiff that the Trustee duties would in no way interfere with her duties and loyalties to this plaintiff. That this Plaintiff consents to her representation after full disclosure.

14. That counsel has paid the vast majority of costs in this case, this plaintiff being financially unable to pay attorney fees and costs due to the triple demotion suffered as a result of the defamatory letter and racial discrimination.

15. That attorneys who have been approached about handling this case have no desire to become involved, citing malpractice reasons, the horror of nine years of judicial error, the costs, the negative rulings and negative attitude of this court, the court's opinion that the case isn't even worth "one cent", the federal and state investigations intertwined with the case, the notoriety, and the inability of Plaintiffs to pay for an attorney to even review the nine years of paperwork and transcripts, which fill over 10 storage boxes.

16. That no attorney has even expressed a desire to become involved with the case.

17. That the removal of plaintiffs' counsel has effectively deprived them of counsel, which is a prejudicial act designed only to destroy Plaintiffs' case and not make it worth "one cent".

18. That this plaintiff was present at the March 31, 1993 Board meeting, where attorney Cynthia Adkison met in closed session with the Board of Trustees seeking to obtain authorization to take action against Plaintiffs' counsel. The Board voted in public, at an open meeting, to take no action. That Judge Edmunds completely ignored Plaintiff's allegations of misconduct committed by Cynthia Adkison, which proves a biased double standard in the treatment of the parties.

19. It is this plaintiff's opinion that Judge Edmunds has a personal bias or prejudice against this plaintiff and has caused, and will continue to cause prejudicial harm to affiant, due to Plaintiff's request to disqualify the first federal judge and due to this federal judge's ex parte communications with a biased and prejudicial judge. The

Court indicated a predisposition as to the manner in which the trial will be conducted: ". . . what I expect to be a fairly short retrial of a limited issue in this matter." (T. 15).

20. That the previous trials were lengthy and very involved, and the Court of Appeals has returned the case for trial. It appears that affiant is being told that the Court is predisposed against him to restrict witnesses and evidence, which enable him to prove his case, and, coupled with the disqualification of his counsel, provide the basis for the Court's biased opinion that the Defendants should not settle for "one cent". There is clearly more than a "limited issue" here. The Judge's comment indicates a clear prejudiced predisposition against this Plaintiff by denying him the rights specifically ordered by the Sixth Circuit.

21. That the biased comment about the "short retrial of a limited issue" coupled with the Judge's comment that the case isn't worth "one cent", indicates that this Judge believes the case is so frivolous and without merit, that she intends to do everything in her power to make the case worth less than "one cent", despite the findings of liability by two juries, which findings were upheld twice by the Sixth Circuit. This is now interpreted by this affiant as a **direct suggestion** to the Defendants to not settle this matter at any cost, because the court will take care of them. Affiant is not only convinced of the "appearance" of impropriety, but is convinced that this Judge is completely biased and prejudiced, and that these comments support this very serious charge.

22. That the first step in accomplishing the Judge's biased goal against this Plaintiff to make certain that this affiant does not receive "one cent", was to take away his counsel, which effectively denies him the right to any counsel.

23. That this affiant has never had legal training and has never handled a legal matter of any kind, which severely prejudices him in pursuing his case.

24. That the circumstances of this case provide this affiant a solid basis to believe this Judge is prejudiced, biased and predisposed against him, and, at a minimum, provides cause to question the Judge's impartiality. Affiant believes the ex parte communication between Judge Gilmore and Judge Edmunds is unethical conduct, which alone warrants the disqualification of the Judge.

25. It is this affiant's opinion that, because of the sensitive background of this case, which is intertwined with a federal grand jury investigation into high ranking judges, prominent attorneys and the U.S. Attorney's office in this District, and this affiant's successful disqualification of Judge Gilmore, that it is impossible for affiant to get a fair trial in the Eastern District. The immediate bias and prejudice of this newly appointed Judge indicates that the taint of Judge Gilmore's disqualification permeates the entire district.

26. It is affiant's fear that the appointment of another Judge in the Eastern District would again result in the Judge being "fullybriefed" by Judge Gilmore or Judge Edmunds.

/s/ Milan Chonich
Milan Chonich

Subscribed and sworn to before me
this 21st day of May, 1993

/s/ Donald J. King
DONALD J. KING

Notary, Notary Public,
Macomb County, MI
My Commission Expires Feb. 4, 1996
Acting in Wayne County, MI

AFFIDAVITS OF CARMEN PASCARETTI

STATE OF MICHIGAN)
) ss:
COUNTY OF WAYNE)

CARMEN PASCARETTI, being duly sworn, deposes and says, that he is a Plaintiff in Case number 85-71172-DT in the Federal Court for the Eastern District of Michigan.

1. That he was present in his attorney's office on the last day of trial in CHONICH II, when Judge Michael Talbot called and spoke over his attorney's speaker phone.

2. That he heard Judge Michael Talbot say that he had had lunch with Judge Horace Gilmore, ("I hear old Horace is giving you a rough way to go"), and that Judge Gilmore indicated he hated the case and wanted Plaintiffs to lose.

3. Judge Talbot indicated that Judge Gilmore believed one of the jurors was opposed to Plaintiffs, stating: "Gilmore says the guy from Ford Motor Company doesn't buy the Plaintiffs' claims".

4. The Judge had forced Plaintiffs to go with all eight jurors, and would not permit Plaintiffs to excuse the two alternates. Prior to the Talbot phone call, this Plaintiff was extremely disturbed and puzzled by this obvious prejudicial ruling.

5. That this phone call also explained the prejudice and bias of the Court and its bizarre rulings throughout the trial. It was clear there was a serious problem with the

Court throughout the trial, but, prior to the Talbot phone call, Plaintiffs could not prove that the outrageous behavior was linked to prejudice and bias, or an extrajudicial source, there being the possible alternative explanation that the Judge's poor health interfered with his ability to think clearly and rationally.

6. This affiant's fear of bias and prejudice stems from comments made in 1987 and 1988 by attorneys Albert Lopatin and Sheldon Miller, who are under state bar and federal investigation. The attorneys claimed that they were responsible for Judge Gilmore's federal appointment and indicated that they had a close friendship with the Judge.

7. That in 1989, Plaintiffs' counsel became a key witness in a scandalous federal investigation involving the corruption of high ranking Judges, known locally as the Bronson, Lopatin and Maher scandal.

8. That after the Talbot phone call, Plaintiff was convinced that the Court was prejudiced and biased against him and requested that the Judge disqualify himself.

9. The Judge disqualified himself and the case was reassigned to Judge Edmunds.

10. That on or about July 23, 1992, Plaintiffs' counsel called affiant after her status conference with Judge Edmunds. Plaintiff's counsel indicated that the Judge was very negative and hostile toward plaintiffs, and that the Judge stated to Plaintiffs' counsel that she had been "fullybriefed" on this case by Judge Gilmore, and that she had had "lengthy discussions" with him.

11. That Plaintiffs' counsel expressed her concern over this ex parte conversation, indicating that it may be unethical and may have tainted the Judge against the plaintiffs.

12. That this ex parte conversation with a prejudiced and biased Judge, certainly gives this plaintiff/affiant cause to question Judge Edmund's impartiality. That the conduct of the Court on May 5, 1993 clearly prejudiced me and my right to have the counsel of my choice. That the comments of the Court on May 5, 1993, (It's not in the College's interest to pay one cent in this . . . "T. 14), were so biased and prejudicial that it proves a predisposition and prejudice against this affiant and clearly impedes affiant from having any possible chance of obtaining counsel.

13. That this plaintiff was fully informed of his counsel's Trustee position and her fiduciary duties and obligations. That it was clear to this plaintiff that the Trustee duties would in no way interfere with her duties and loyalties to this plaintiff. That this Affiant consents to her representation after full disclosure.

14. That counsel has paid the vast majority of costs in this case, this plaintiff being financially unable to pay attorney fees and costs due to the triple demotion suffered as a result of the defamatory letter and racial discrimination.

15. That attorneys who have been approached about handling this case have no desire to become involved, citing malpractice reasons, the horror of nine years of judicial error, the costs, the negative rulings and negative attitude of this court, the court's opinion that the case

isn't even worth "one cent", the federal and state investigations intertwined with the case, the notoriety, and the inability of Plaintiffs to pay for an attorney to even review the nine years of paperwork and transcripts, which fill over 10 storage boxes.

16. That no attorney has even expressed a desire to become involved with the case.

17. That the removal of plaintiffs' counsel has effectively deprived them of counsel, which is a prejudicial act designed only to destroy Plaintiffs' case and not make it worth "one cent".

18. That this plaintiff was aware that attorney Cynthia Adkison met in closed session with the Board of Trustees seeking to obtain authorization to take action against Plaintiffs' counsel. On March 31, 1993 the Board voted in public, at an open meeting, to take no action. That Judge Edmunds completely ignored Plaintiff's allegations of misconduct committed by Cynthia Adkison, which proves a biased double standard in the treatment of the parties.

19. It is this plaintiff's opinion that Judge Edmunds has a personal bias or prejudice against this plaintiff and has caused, and will continue to cause prejudicial harm to affiant, due to Plaintiff's request to disqualify the first federal judge and due to this federal judge's ex parte communications with a biased and prejudicial judge. The Court indicated a predisposition as to the manner in which the trial will be conducted: ". . . what I expect to be a fairly short retrial of a limited issue in this matter." (T. 15).

20. That the previous trials were lengthy and very involved, and the Court of Appeals has returned the case for trial. It appears that affiant is being told that the Court is predisposed against him to restrict witnesses and evidence, which enable him to prove his case, and, coupled with the disqualification of his counsel, provide the basis for the Court's biased opinion that the Defendants should not settle for "one cent". There is clearly more than a "limited issue" here. The Judge's comment indicates a clear prejudiced predisposition against this Plaintiff by denying him the rights specifically ordered by the Sixth Circuit.

21. That the biased comment about the "short retrial of a limited issue" coupled with the Judge's comment that the case isn't worth "one cent", indicates that this Judge believes the case is so frivolous and without merit, that she intends to do everything in her power to make the case worth less than "one cent", despite the findings of liability by two juries, which findings were upheld twice by the Sixth Circuit. This is now interpreted by this affiant as a **direct suggestion** to the Defendants to not settle this matter at any cost, because the court will take care of them. Affiant is not only convinced of the "appearance" of impropriety, but is convinced that this Judge is completely biased and prejudiced, and that these comments support this very serious charge.

22. That the first step in accomplishing the Judge's biased goal against this Plaintiff to make certain that this affiant does not receive "one cent", was to take away his counsel, which effectively denies him the right to any counsel.

23. That this affiant has never had legal training and has never handled a legal matter of any kind, which severely prejudices him in pursuing his case.

24. That the circumstances of this case provide this affiant a solid basis to believe this Judge is prejudiced, biased and predisposed against him, and, at a minimum, provides cause to question the Judge's impartiality. Affiant believes the ex parte communication between Judge Gilmore and Judge Edmunds is unethical conduct, which alone warrants the disqualification of the Judge.

25. It is this affiant's opinion that, because of the sensitive background of this case, which is intertwined with a federal grand jury investigation into high ranking judges, prominent attorneys and the U.S. Attorney's office in this District, and this affiant's successful disqualification of Judge Gilmore, that it is impossible for affiant to get a fair trial in the Eastern District. The immediate bias and prejudice of this newly appointed Judge indicates that the taint of Judge Gilmore's disqualification permeates the entire district.

26. It is affiant's fear that the appointment of another Judge in the Eastern District would again result in the Judge being "fullybriefed" by Judge Gilmore or Judge Edmunds.

/s/ Carmen Pascaretti
Carmen Pascaretti

Subscribed and sworn to before me
this 21st day of May, 1993

/s/ Joyce I. Ward
Notary, JOYCE I. WARD,
NOTARY PUBLIC
OAKLAND COUNTY,
STATE OF MICHIGAN
MY COMMISSION EXPIRES
4-8-96

CERTIFICATE OF COUNSEL

SUE E. RADULOVICH, attorney for Plaintiffs MILAN CHONICH and CARMEN PASCARETTI, does hereby certify that I have been counsel of record on this matter since March 15, 1985 and since April 14, 1984 on the original complaint filed in Wayne County Circuit Court.

I prepared the above affidavits of Milan Chonich and Carmen Pascaretti at their request.

I am fully informed as to all proceedings therein, having personal knowledge of the facts contained in the affidavits of the Plaintiffs.

In addition to asserting that the affidavits are made in good faith and are not done for the purpose of hinderance or delay, I can personally attest to the truthfulness of the facts in the affidavits.

/s/ Sue E. Radulovich
SUE E. RADULOVICH 33346
Attorney for Plaintiffs

May 21, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Milan Chonich and
Carmen Pascaretti,

Plaintiffs,

Case No. 85-71172
Hon. Nancy G. Edmunds

v.

Wayne County
Community College
and Juanita Ford,

Defendants.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION AND DENYING PLAINTIFFS' MOTION TO DISQUALIFY THE JUDGE

This matter has come before the Court upon Plaintiffs' motion for reconsideration and their motion to disqualify the judge. For the reasons set forth below, Plaintiffs' motions are denied.

I. Facts

Plaintiffs, Milan Chonich and Carmen Pascaretti, brought suit against Defendants, Wayne County Community College and Juanita Ford, alleging certain claims arising out of their former employment at the College. They allege that the were victims of reverse discrimination, retaliation, libel and slander by Juanita Ford, a Trustee of the College. Plaintiffs seek damages and attorney fees.

The suit has been tried twice, and the Sixth Circuit recently reversed the matter for a new trial. Defendants contend that the only issue to be determined on retrial is the determination of the amount of noneconomic damages that Plaintiffs are entitled to on their claim for retaliation. Plaintiffs contend that this case must be retried on the issues of defamation damages, including actual/compensatory and punitive damages against Defendant Juanita Ford, defamation liability and the full range of damages against the College and the full range of non-economic damages against the College for retaliation. Plaintiffs claim for attorney fees also must be determined.

In November of 1992, Plaintiffs' counsel Sue Radulovich was elected to the Board of Trustees of Wayne County Community College, the governing body of the College. At a meeting of the Board on January 4, 1993, Ms. Radulovich read a statement disclosing her conflict of interest and requesting that she not be provided with any information or documents relating to this lawsuit which are not public information. The minutes reflect that the Board accepted the reading of the statement. The minutes do not reflect any discussion regarding waiver of the conflict.

As a result of Ms. Radulovich's dual role as Trustee for the College and attorney for Plaintiffs, the College moved to disqualify Ms. Radulovich from representing Plaintiffs in this action. The College contends that Ms. Radulovich has an inherent and incompatible conflict of interest, because she cannot serve as counsel for Plaintiffs in this suit without compromising the best interests of the

College and she cannot serve as a Trustee of the College without compromising the best interests of Plaintiffs.

A hearing was held on the motion for disqualification on May 5, 1993. At the hearing, the Court granted the motion, indicating that a written order would follow. On May 11, 1993, the Court entered an Order of Disqualification, which provided:

> It is hereby ordered that Plaintiffs' counsel, Sue E. Radulovich, is disqualified from further representation of Plaintiffs in this case for the reasons stated by the Court on the record at hearing on the motion on May 5, 1993, so long as she remains a member of the Board of Trustees of Wayne County Community College. Plaintiffs shall have thirty (30) days to obtain new counsel and enter counsel's appearance with the Court unless Plaintiffs' counsel resigns her position on the Board of Trustees within that time.

Plaintiffs now request that the Court reconsider its order. Plaintiffs have also moved to disqualify Judge Edmunds from hearing this case.

II. Motion for Reconsideration

A. Standard for Review

Pursuant to Rule 7.1(h) of the Local Rules for the Eastern District of Michigan, a motion for reconsideration should be granted if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such palpable defect. A motion

that merely presents the same issues already ruled upon by the court shall not be granted.

B. Jurisdiction

Federal courts have the inherent power to disqualify an attorney who has an unresolvable conflict of interest. Courts have an interest in preserving the integrity of the adversary process.

> Courts have vital interests in protecting the integrity of their judgments, maintaining public confidence in the integrity of the bar, eliminating conflicts of interest, and protecting confidential communications between attorneys and their clients. To protect these vital interests, courts have the power to disqualify an attorney from representing a particular client.

Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F.Supp. 1200, 1203 (E.D. Pa. 1992). *Accord Matter of Grand Jury Proceedings*, 428 F.Supp. 273 (E.D. Mich. 1976) (court's duty to enforce ethical standards gives court responsibility to "nip any potential conflict of interest in the bud"). Thus, this Court has jurisdiction over, and the responsibility to address, the issue of disqualification of Plaintiffs' counsel.

C. Need for Evidentiary Hearing

Plaintiffs' motion for reconsideration alleges that the Court erroneously ruled that an attorney is not entitled to an evidentiary hearing regarding disqualification. The Sixth Circuit has addressed this issue and has held that

an evidentiary hearing is not required on all disqualification motions. *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982). The court noted:

> We think a decision for disqualification is adequately founded without an evidentiary hearing if the "factual inquiry" is conducted in a manner that will allow of appellate reviews, as it is when conducted on affidavits and documents that would be acceptable under Rule 56(e) . . . and if the district judge does not undertake to decide disputed issues of fact.

Id. at 710.

No evidentiary hearing was required in this case. In rendering its May 11 order, the Court did not decide any disputed issues of fact. The Court determined as a matter of law, under the circumstances of this case, that Ms. Radulovich has an impermissible conflict of interest that requires her either to resign from her position as a member of the Board of Trustees of Wayne County Community College or to withdraw as counsel for Plaintiffs in this case.

D. Standards of Conduct for Public Officers and Employees Act

The Standards of Conduct for Public Officers and Employees Act, Mich. Comp. Laws Ann. §§ 15.341-.348, imposes certain restrictions on the activities of public officials:

> (5) A public officer or employee shall not engage in a business transaction in which the public officer or employee may profit from his

> or her official position or authority or benefit financially from confidential information which the public officer or employee has obtained or may obtain by reason of that position or authority. . . .
>
> (6) Except as provided in seciton [sic] 2a, a public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when the employment may tend to impair his or her independence of judgment or action in the performance of official duties.

Mich. Comp. Laws Ann. § 15.342(5) & (6).

Section 15.342 requires the Court to disqualify Ms. Radulovich from representing Plaintiffs so long as she is a College Trustee. Even though she attempts to isolate herself from this suit by disclosing the conflict to the Board and by requesting that she not be provided with any information concerning the suit, she may inadvertently obtain information concerning the lawsuit by virtue of her position on the Board, which could put her in the position of benefitting financially from confidential information which she has due to her position as a public official. Moreover, Ms. Radulovich cannot seek damages on behalf of Plaintiffs, let alone attorney fees for herself, without in effect rendering services that are incompatible or in conflict with the discharge of her official duties of [sic] behalf of the College. Further, Ms. Radulovich's representation of Plaintiffs may tend to impair her independence of judgment or action in the performance of her duties as a Trustee of the College. Section 15.342 is

mandatory; it does not permit the public agency the officer serves to waive the conflict.[1]

E. Michigan Rule of Professional Conduct 1.11

Michigan Rule of Professional Conduct 1.11(c)(1) also imposes restrictions on public officers:

> Except as law may otherwise expressly permit, a lawyer serving as *a public officer* or employee *shall not*:
>
> > (1) *participate in a matter in which the lawyer participated personally and substantially while in private practice* or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyers stead in the matter. . . .

(Emphasis added). The purpose of Rule 1.11 is to prevent an attorney from using public office for the advantage of a private client. "A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential governmental information about the client's adversary obtainable only through the lawyers' government service." Comment to MRPC 1.11.

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[1] It should also be noted that although Mrs. Radulovich contends that the Board of Trustees of the College has waived the conflict of interest in this case, she has not submitted any evidence of this alleged waiver. In fact, it is the College itself that moved to disqualify Mrs. Radulovich.

A recent Michigan Ethics Opinion interpreted MRPC 1.11(c). Informal Opinion RI-126 (April 17, 1992). In Informal Opinion RI-126, the Ethics Committee held that MRPC 1.11(c) prohibits an attorney acting as a public official from participating in a matter in which the attorney participated while in private practice. Although an attorney's role as representative for a party adverse to the city was clearly in conflict with his role as a city councilman, there is no per se rule prohibiting the dual role. The test is "whether the public duties 'materially limit' the lawyer's representation of the client and if so whether a disinterested lawyer would reasonably believe the representation would not be adversely affected and the client consented." *Id.*

Ms. Radulovich argues that she can successfully avoid the conflict of interest problem by not participating in any meetings or decision-making regarding this lawsuit and by requesting that as Trustee she not be provided with any confidential information regarding this lawsuit.[2]

---

[2] Ms. Radulovich argues that MRPC 1.11 does not apply because she is not paid by the College and she does not represent the College as its attorney. Neither payment nor representation of the College as an attorney is required. MRPC 1.11 concerns lawyers who serve as public officers. It is undisputed that Ms. Radulovich is a lawyer who acts as a public officer in her role as College Trustee.

Further, at the hearing on this matter she indicated that as a Trustee she would not deal with any matter regarding this lawsuit because this lawsuit is a minute issue in the large arena of College concerns. Even if the College considers this suit and its potential liability for attorney fees in excess of $1,000,000 allegedly owed to Ms. Radulovich as a minuscule matter, the Rules of Professional Conduct and the Standards of Conduct for Public Offices do not contain any "de minimis" exception.

However, Ms. Radulovich's duties as Trustee of the College materially limit her representation of Plaintiffs and vice versa; a disinterested lawyer would not reasonably believe the representation of each party would not be adversely affected by her duties to the other. Thus, even though Plaintiffs have consented to the conflict of interest, MRPC 1.11 prohibits Ms. Radulovich from acting as Trustee of the College at the same time that she pursues this lawsuit against the College on behalf of Plaintiffs.

F. Michigan Rule of Professional Conduct 1.7(b)

Michigan Rule of Professional Conduct 1.7(b) similarly requires Ms. Radulovich to be disqualified due to the irreconcilable conflict of interest involved in this case. Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation. . . .

Regarding client consent, the Comments to Rule 1.7 explains, "[W]ith respect to material limitations on representation of a client, when a disinterested lawyer would

conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly as for such agreement or provide representation on the basis of the client's consent."

Rule 1.7 requires disqualification in this case because a disinterested lawyer would conclude that Plaintiffs and the College should not agree to Ms. Radulovich's acting in her dual roles in this matter. Thus, the conflict of interest in this case may not be waived.

G. Ability to Obtain Other Counsel

Plaintiffs allege that they are unable to obtain other counsel due to statements made by the Court at the hearing in this matter. In making this allegation, Plaintiffs rely on mischaracterizations of the record. While the transcript of the May 5 hearing speaks for itself, the Court is compelled to respond to Plaintiffs allegation that "When this Court claimed that it was not in the Defendant's best interest to pay 'one cent' in this case, it sent out a very strong signal that it either considered settlement of cases to be unethical and a breach of fiduciary duties, or it meant that the Court was predisposed, with a prejudiced and biased position that the Plaintiffs' case was not worth one cent."

In fact, the Court made no comment whatsoever regarding the issue of settlement or the value of plaintiffs' case. These matters were not addressed at the May 5 hearing. The "one cent" comment arose as part of a discussion regarding whether or not Ms. Radulovich's recusal from matters concerning this lawsuit when she acted as a Trustee would successfully avoid the conflict of

interest problem at issue, and whether it was possible to fulfill her fiduciary responsibilities to the College while she sought to impose a multimillion dollar liability against it. The Court's comment should be examined in context:

> THE COURT: How can you argue that, you know, we ought to open them up to, you know, a million or more dollars of liability because you think that the college has acted improperly? If you are a fiduciary of that college and, you know, are trying to preserve and protect it for all purposes?
>
> MS. RADULOVICH: Your Honor, it's in the same way that Juanita Ford as a trustee recuses herself, and that she has recused herself for nine years. She sits on the board too.
>
> THE COURT: She's not an attorney.

Tr. p. 11. The Court went on to say the following:

> THE COURT: $3 million? It's not in the college's interest to pay one cent in this – in this. Their interest is to pay as little or nothing as possible, to convince the Court that they are not liable, and if they are liable, that there were no damages.
>
> . . .
>
> THE COURT: So the fact that you don't participate in this does not alleviate the conflict when you're trying this case.

Tr. pp. 14-15.

Thus, the record does not support the allegation that the Court considers settlement of cases to be unethical

and a breach of fiduciary duty, nor that the Court is prejudiced with a belief that Plaintiffs' case is not worth anything. Nothing in the Court's comments would dissuade any other attorney from taking this case.

III. Motion to Disqualify Judge

Plaintiffs have also moved to disqualify this Court from hearing this case under 28 U.S.C.A. §§ 144 & 455. Sections 144 and 455 provide for disqualification of a judge due to bias or prejudice. These statutes must be strictly construed to safeguard the judiciary from frivolous attacks. *Rademacher v. City of Phoenix*, 442 F. Supp. 27 (D. Ariz. 1977). Further, a claim of bias or prejudice must be based on something other than rulings in the case. *Hanger v. U.S.*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969).

While the bases for Plaintiffs' motion to disqualify is difficult to discern from their various vague allegations,[3] it appears that the bases of their motion are the following: (1) they allege that the Court is biased and prejudiced as reflected by the "one cent" statement discussed above; (2) they allege that Judge Gilmore, the judge involved in the first two trials of this case, was biased and prejudiced and that he had improper ex parte communications with this Court; and (3) they allege that the Court has prejudged their case.

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[3] Plaintiffs motion mentions facts regarding many wholly unrelated matters, such as the investigation of Judge Bronson, a Michigan state court judge.

As discussed above, the allegation that the Court considers settlement of cases to be unethical and a breach of fiduciary duty, and that the Court was prejudiced with a belief that Plaintiffs' case was not worth anything is false. The Court made no comment whatsoever regarding the issue of settlement or the value of Plaintiffs' case.

With regard to the issue of this Court's communications with Judge Gilmore regarding this case, Plaintiffs alleges that any communication was a violation of Canon 3(4) of the Code of Judicial Conduct. Canon 3(4) provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate, consider, nor permit ex parte or other communications with a litigant or his attorney concerning a pending or impending proceeding.

This Canon prohibits ex parte communications with a litigant or his attorney. Plaintiffs do not allege that the Court has engaged in any such communications. Moreover, communications between Judge Gilmore and this Court have been limited to a brief discussion of the nature of this case at the time it was transferred to this Court's docket; such a communication does not violate judicial ethics nor does it render this Court biased or prejudiced in this case.

Plaintiffs also claim that this Court has prejudged their case, based on a statement the Court made at the May 5 hearing. The Court stated:

> THE COURT: Well, it seems to me that if I disqualify you, that, no, you can't vote on that, and that someone else would have to represent

> your – represent you in your claim for attorney fees, and that someone else would have to take over for Mr. Chonich, *What I expect to be a fairly short retrial of a limited issue in this matter.*

The Court's statement merely reflected the view that the trial of this matter is not expected to be protracted. The statement does not indicate any predisposition regarding the merits of this case.

Accordingly, no ethical violation has occurred, and no bias or prejudice exists. It appears that Plaintiffs' claim of bias and prejudice is based on this Court's ruling on the College's motion to disqualify Ms. Radulovich. A motion to disqualify a judge must be based on something other than rulings in the case. *Hanger*, 398 F.2d 91. As a result, Plaintiffs' motion to disqualify is denied.

IV. Conclusion

Because Plaintiffs' motion for reconsideration fails to demonstrate that the Court and the parties were misled by any palpable defect, Plaintiffs' motion for reconsideration is hereby DENIED. Further, Plaintiffs' motion to disqualify the judge under 28 U.S.C.A. §§ 144 and 455 is hereby DENIED.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: MAY 27 1993

PURSUANT TO RULE 77(d) FRCivP
COPYS HAVE BEEN MAILED TO:

/s/ Sue E. Radulovich
/s/ Cynthia Adkison
/s/ Daniel Bretz

MAY 27 1993
/s/ Illegible
Deputy Court Clerk

A TRUE COPY
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY /s/ Illegible
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Milan Chonich and
Carmen Pascaretti,

Plaintiffs,

v.

Case No. 85-71172
Hon. Nancy G. Edmunds

Wayne County Community
College and Juanita Ford,

Defendants.
_____/

ORDER PARTIALLY VACATING MAY 27 ORDER

On May 27, 1993, this Court entered an order denying Plaintiffs' motion for reconsideration and denying Plaintiffs' motion to disqualify the judge under 28 U.S.C.A. §§ 144 and 455. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Accordingly, the Court hereby VACATES that portion of the May 27, 1993 order denying Plaintiffs' motion to

disqualify the judge, and the motion to disqualify shall be assigned to another judge.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: JUN 2 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Milan Chonich and
Carmen Pascaretti,

Plaintiffs,

v.

Wayne County Community
College and Juanita Ford,

Defendants.
_____/

Case No. 85-71172
Hon. Nancy G. Edmunds
(Filed Jun. 14, 1993)

ORDER DENYING MOTION FOR RECONSIDERATION AND/OR REHEARING OF MAY 27, 1993 AND JUNE 2, 1993 ORDERS

On May 27, 1993, this Court entered an order denying Plaintiffs' motion for reconsideration and denying Plaintiffs' motion to disqualify the judge under 28 U.S.C.A. §§ 144 and 455. On June 2, 1993, the Court entered an order vacating the May 27 order only with respect to the denial of the motion to disqualify and ordering that the motion to disqualify be assigned to another judge. The motion was reassigned as case no. 93-72293.

A motion to disqualify a judge under 28 U.S.C.A. § 144 may be reassigned to another judge. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse

> party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Although the statute uses the word "shall," courts have interpreted it to mean that reassignment of a motion to disqualify is permitted, but not required. *Parker v. Sill*, No. 92-1158, 1993 U.S. App. Lexis 6922 (6th Cir. March 25, 1993) (construing 28 U.S.C. § 144 and citing *U.S. v. Azhocar*, 581 F.2d 735 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979)). *See also U.S. v. Hatchett*, No. 92-1065, 1992 U.S. App. Lexis 27169 (6th Cir. Oct. 15, 1992) (construing 28 U.S.C. § 455). Reassignment is required only when the judge who is the target of the disqualification motion determines that the affidavit was filed in good faith, was timely, and was legally sufficient. *See, e.g., Parker*, No. 92-1158, 1993 U.S. App. Lexis 6922; *Azhocar*, 581 F.2d 735; *Marty's Floor Covering Co., Inc. v. GAF Corp.*, 604 F.2d 266 (4th Cir. 1979), *cert. denied*, 494 U.S. 1017 (1980).

In ordering reassignment in this case, the Court did not pass judgment on whether the affidavits were filed in good faith, were timely, or were sufficient, but merely exercised its discretion in ordering reassignment under the rule that reassignment is permissive.

Accordingly, the Court hereby DENIES Plaintiffs' motion for reconsideration and/or rehearing of May 27, 1993 and June 2, 1993 orders.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

Dated: JUN 11 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Milan Chonich and
Carmen Pascaretti,

Plaintiffs,

v.

Case No. 85-71172
Hon. Nancy G. Edmunds

Wayne County Community
College and Juanita Ford,

Defendants.
_____/

ORDER DENYING JUNE 11 MOTION FOR RECONSIDERATION AND/OR REHEARING OF MAY 27, 1993 AND JUNE 2, 1993 ORDERS AS MOOT

This matter came before the Court on Plaintiffs' motion filed on June 11, 1993 for reconsideration and/or rehearing of May 27, 1993 and June 2, 1993 orders. This motion is almost identical to the Plaintiffs' motion by the same title filed on June 7, 1993. The June 7 motion was denied. Thus, this motion is denied as moot.

Further, although the June 11 motion is slightly different than the June 7 motion,[1] both motions are based on

[1] The June 11 motion elaborates slightly on the June 7 motion, alleging that this Court is automatically disqualified and the entire case should be transferred to another judge. The June 11 motion alleges as follows:

> This Court presented its ruling on the merits of the affidavits in its May 27, 1993 order. Although the order has been partially vacated, the court

the false premise that this Court already ruled on the timeliness and sufficiency of Plaintiffs' affidavits and thus should be automatically disqualified from dealing with this case. In its June 11 order, this Court denied Plaintiffs' June 7 motion, specifically noting that the Court did not rule on the timeliness or sufficiency of the affidavits, or on whether the affidavits were filed in good faith.[2]

Accordingly, the Court hereby DENIED Plaintiffs' June 11 motion for reconsideration and/or rehearing of May 27, 1993 and June 2, 1993 orders as MOOT.

/s/ Nancy G. Edmunds
Nancy G. Edmunds
U.S. District Judge

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improperly proceeded with the Chonich case after it was legally disqualified. There is no disqualification motion udner [sic] § 144 for any other Judge to hear. . . . The blind draw of the Clerk's office must be for the transfer of the case, not for the transfer of a Motion, because Judge Edmunds is already legally disqualified.

The underlined portion is included in the June 11 motion and not in the June 7 motion.

[2] The June 11 order stated as follows:

In ordering reassignment in this case, the Court did not pass judgment on whether the affidavits were filed in good faith, were timely, or were sufficient, but merely exercised its discretion in ordering reassignment under the rule that reassignment is permissive.

Dated: JUN 18 1993

PURSUANT TO RULE 77(d)
FRCivP
COPIES HAVE BEEN MAILED
TO:
Sue Radulovich
Cynthia Adkison
Daniel Bretz

ON, JUN 18 1993
/s/ Illegible
DEPUTY COURT CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MILAN CHONICH and
CARMEN PASCARETTI,

Plaintiffs,

vs.

WAYNE COUNTY
COMMUNITY COLLEGE
and JUANITA FORD,

Defendants.
_____/

CASE NO. 93-X-72293-DT
HON. LAWRENCE P.
ZATKOFF

OPINION AND ORDER DENYING
PLAINTIFFS' MOTION TO DISQUALIFY
JUDGE NANCY G. EDMUNDS

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 8th day of July, 1993.

PRESENT: THE HONORABLE
LAWRENCE P. ZATKOFF
UNITED STATES
DISTRICT JUDGE

I. INTRODUCTION

On May 27, 1993, United States District Judge Nancy G. Edmunds ("Judge Edmunds") entered an order denying the above-named plaintiffs' motion to disqualify Judge Edmunds from this proceeding. On June 2, 1993, Judge Edmunds entered an order vacating the May 27, 1993 order with respect to plaintiffs' motion to disqualify.

At that point in time, the motion to disqualify was sent to the Clerk's Office, and through a blind draw, the motion was assigned to this Court as Miscellaneous Case Number 93-X-72293DT. In light of the fact that this Court is obligated to accept as true every allegation set forth in plaintiffs' motion to disqualify, defendants were not required to file a response brief.[1] Pursuant to E.D. Mich. LR 7.1(e)(2), this Court ORDERS that plaintiffs' motion to disqualify Judge Edmunds be disposed of upon the brief that has been submitted to this Court and without this Court entertaining oral argument on the motion. For the reasons set forth below, plaintiffs' motion to disqualify Judge Edmunds will be DENIED.[2]

II. BACKGROUND

This case originally was filed in 1985. The case was assigned to United States District Judge Horace W. Gilmore. After the United States Court of Appeals for the Sixth Circuit remanded this case to the district court for the second time, Judge Gilmore disqualified himself from

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[1] Although this Court did not request defendants to file a response brief, defendant Ford filed a response brief on June 17, 1993. In addition, defendant Wayne County Community College filed a response brief on June 21, 1993. This Court will not consider these response briefs.

[2] This Court received in the mail a photocopy of plaintiffs' petition for a writ of mandamus against Judge Edmunds, which plaintiffs filed with the Sixth Circuit. This Court's photocopy of plaintiffs' petition does not reflect the date on which it was filed. Plaintiffs' petition in no way affects this Court's jurisdiction to address the motion pending before this Court.

this matter, because, according to plaintiffs, Judge Gilmore was prejudiced and biased in this matter, and that he also had made an ex parte communication, while the case was being tried, to Judge Talbot of the Wayne County Circuit Court.

The case was reassigned to Judge Edmunds. Plaintiffs allege that at the July 23, 1992 status conference with Judge Edmunds, that Judge Edmunds "started the in chamber status conference with a very hostile tone directed at plaintiffs' counsel and stated: 'I've been fully briefed on this matter by Judge Gilmore. . . . Judge Gilmore and I have had lengthy discussions concerning this case. . . . How did I get so lucky?' " Plaintiffs' brief in support of motion to disqualify at 3.

Plaintiffs also complain of statements which Judge Edmunds made during a May 5, 1993 hearing on defendants' motion to have plaintiffs' counsel disqualified in this matter. The basis for defendants' motion was that commencing in January 1993, plaintiffs' counsel became a trustee for defendant Wayne County Community College, and thus plaintiff had a conflict of interest in representing plaintiffs in this matter in which Wayne County Community College is a defendant. Plaintiffs, without providing this Court with a complete transcript of the hearing, rely on the following comment made by Judge Edmunds: "It's not in the college's interest to pay one cent in this [case]. . . . " However, this statement was made in the context of the following exchange between Judge Edmunds and Ms. Radulovich, plaintiffs' counsel.

> THE COURT: . . . . You've got an interest here, and an interest here, and you can't, you know, be all things to all people. You can't represent

Mr. Chonich suing the – the college for a million dollars plus, and be a trustee of the college, with a fiduciary responsibility to act in its interest –

MS. RADULOVICH: And I don't.

THE COURT: – as a – pardon?

MS. RADULOVICH: I don't act with anything in regard of this case because of that. That's what I avoid.

THE COURT: Ms. Radulovich, you're missing the point. It's not in the college's best interest to pay a million dollars.

MS. RADULOVICH: It might be.

THE COURT: I mean – it's – it's just not.

MS. RADULOVICH: A jury could award $3 million.

THE COURT: $3 million? It's not in the college's interest to pay one cent in this – in this. Their interest is to pay as little or nothing as possible, to convince the Court that they are not liable, and if they are liable, that there were no damages.

MS. RADULOVICH: Okay.

THE COURT: That's what's in the college's interest.

MS. RADULOVICH: Fine, Judge.

THE COURT: So the fact that you don't participate in this does not alleviate the conflict when you're trying this case. Your own college with liability.

As noted above, pursuant to 28 U.S.C. §§ 144 and 455, plaintiffs' now move to disqualify Judge Edmunds

from this matter and have the case reassigned to the Western District of Michigan.[3]

III. ANALYSIS

A. STANDARD OF REVIEW

Recusal motions, whether brought under § 144 or § 455 of Title 28, are matters committed to the sound discretion of the district judge deciding the motion. *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 165 (6th Cir. 1984); *Kelly v. Metropolitan County Bd. of Educ.*, 479 F.2d 810, 811 (6th Cir. 1973).

B. PLAINTIFFS' 28 U.S.C. § 144 MOTION

Section 144 of the Title 28 reads as follows:

> Whenever a party to any proceeding in a district makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias and prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard or good cause shall be shown

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[3] Plaintiffs contend that because of the climate in the Eastern District of Michigan, that the only proper place for this case to be tried is in the Western District of Michigan.

> for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

Thus, under § 144, a district judge must "examine the affidavit to determine whether it is timely and legally sufficient." *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988) (quoting *In Re City of Detroit*, 828 F.2d 1160, 1164 n.2 (6th Cir. 1987) (internal quotations omitted)). "Failure to follow these requirements defeats a charge of bias." *Crowder v. Conlan*, 740 F.2d 447, 453 (6th Cir. 1984) (internal quotations omitted) (citation omitted). In addition, the alleged bias of the judge must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Easley*, 853 F.2d at 1355-1356 (6th Cir. 1988); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). Furthermore, section 144 address [sic] the issue of actual bias in the district judge. *See, e.g., United States v. Kehlbeck*, 766 F.Supp. 707, 711 (S.D. Ind. 1990) ("Under § 144, the well-pleaded facts [of the affidavit] must show *actual* extra-judicial, personal bias or prejudice in order for recusal to be proper – the *appearance* of bias or prejudice is not sufficient.") (emphasis in original).

Here, the Court finds that plaintiffs' request for disqualification under 28 U.S.C. § 144 is not only untimely, but the request also is legally insufficient to support such a motion. As to the issue of timeliness, plaintiffs state that

at the July 23, 1992 status conference, Judge Edmunds stated that Judge Gilmore has fully briefed her on the case. Plaintiffs then elected to actively participate in the case as it proceeded before Judge Edmunds. It was not until May 25, 1993, that plaintiffs decided to file their § 144 motion to have Judge Edmunds disqualify herself from the case.

While § 144's mandates that the affidavit be filed "not less than ten days before the beginning of the term" is no longer interpreted literally, inasmuch as courts now sit on a continuous basis, "[i]t is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2nd Cir. 1987) (recusal motion held untimely where movant waited for two months after events giving rise to charge of bias or prejudice to move for disqualification). *See also Perkins v. Spivey*, 911 F.2d 22, 33 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1309 (1991) (motion to recuse must be filed at first opportunity after discovery of facts tending to prove disqualification). The rationale underlying this rule of law is that "[p]romptness in asserting disqualification is required to prevent a party from awaiting the outcome before taking action." *Crowder*, 740 F.2d at 454 (citations omitted).[4]

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[4] Plaintiffs argue that after the July 1992 status conference they did not believe that a motion for disqualification should be made at that time, in light of the fact that Judge Gilmore had recently disqualified himself from the case. This fact does not alleviate, however, plaintiffs from the effect of their decision not [sic] file a motion

In the instant case, plaintiffs waited slightly over ten (10) months to file their motion to disqualify Judge Edmunds, based on the comments she made at the July 23, 1992 status conference. Clearly, the motion to disqualify based on these remarks is untimely. In addition, plaintiffs also base their argument, in support of the motion to disqualify Judge Edmunds, on comments which Judge Edmunds made during oral arguments on defendants' motion to disqualify plaintiffs' counsel in this matter. These comments were made on May 5, 1993. As noted above, plaintiffs waited until May 25, 1993 to filed [sic] their motion to disqualify. Again, the twenty (20) days between plaintiffs obtaining the knowledge of facts demonstrating the basis for their disqualification motion and the motion being filed renders the motion untimely. *Crowder*, 740 F.2d at 454 (twelve (12) day delay makes § 144 motion untimely).

Moreover, even if the motion may be construed as being timely filed, the affidavit is legally insufficient to support plaintiffs' motion. First, as to the remarks which Judge Edmunds made at the status conference, neither of the plaintiffs were at the status conference, and thus the affidavits which plaintiffs submitted in support of their § 144 motion are not based on personal knowledge.[5] In

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to disqualify as soon as possible after the July 1992 status conference. Plaintiffs' made the decision to continue on with the case without filing the motion to disqualify. As a result, plaintiffs must accept the consequences of their own decision.

[5] The relevant paragraphs of each affidavit, which are identical to each other, even including a typographical error, states as follows:

> 10. That on or about July 23, 1992, Plaintiffs' counsel called affiant after her status conference with Judge

addition, Judge Edmunds comments during the May 5, 1993 hearing on defendants' motion to disqualify plaintiffs' counsel, do not reveal a bias or prejudice on the part of Judge Edmunds. After a review of the entire transcript of the May 5, 1993 hearing, this Court can state confidently that Judge Edmunds was not commenting on the merits of plaintiffs' case, rather Judge Edmunds was merely trying to explain to plaintiffs' counsel why she, Judge Edmunds, believed a conflict of interest existed in the case [sic] bar.[6] Such actions are completely proper. *Compare United States v. Lopez*, 944 F.2d.33, 37 (1st Cir. 1991) ("The record reflects that the judge's only purpose in referring to the case in which another women pled [sic] guilty to a drug violations was to help explain the judge's refusal to permit dismissal of the charges against

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> Edmunds. Plaintiff's [sic] counsel indicated that the Judge was very negative and hostile towards plaintiffs, and the Judge stated to Plaintiffs' counsel that she had been "fully briefed" on this case by Judge Gilmore, and that she had had "lengthy discussions" with him.
>
> 11. That Plaintiffs' counsel expressed her concern over this ex parte conversation, indicating that it may be unethical and may have tainted the Judge against the plaintiffs.

Affidavit of Plaintiff Chonich, ¶¶ 10 & 11; Affidavit of Plaintiff Pascaretti, ¶¶ 10 & 11.

[6] This Court is left only to wonder what plaintiffs' counsel's reaction would be if it was Judge Edmunds who was a trustee for defendant Wayne County Community College, instead of plaintiffs' counsel. Indeed, if this was the case, then Judge Edmunds would have to recuse herself from the case. *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, ___, 108 S.Ct. 2194, 2203-06 (1988).

appellant, given the evidence adverted to in the government's proffer. The judge intimated no opinion as to appellant's guilt or innocence, or on the merits of any defense available to her.") *with Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 155-57 (6th Cir. 1979) ("The Court is of the view that . . . [the district court's] remarks were both unsupported by the record and unnecessary in the circumstances.[ ]") (footnote omitted). In addition, there are no facts which establish that these comments emanated from a source other than the court's participation in this case. Therefore, the May 5, 1993 ruling neither came from an extrajudicial source nor resulted in an opinion on the merits on some basis other than what Judge Edmunds learned from her participation in this case. Accordingly, the affidavits are legally insufficient, and plaintiffs' § 144 motion to disqualify Judge Edmunds is thus DENIED.

C. PLAINTIFFS' 28 U.S.C. § 455 MOTION

Section 455 of Title 28 provides, in part, that:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). As the language of the statue [sic] suggests, § 445(a) addresses the issue of the appearance of bias or prejudice. Furthermore:

> Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, this section sets forth a mandatory

> guideline that federal judges must observe *sua sponte*.

Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (footnotes omitted).

In addition, subsection (a) of § 455 establishes an objective standard "so that a judge should disqualify himself only if there is a reasonable factual basis for doubting . . . [her] impartiality." *In re M. Ibrahim Khan*, 751 F.2d at 164. Plaintiffs, relying on the same factual arguments as they did for their § 144 motion, contend that there is a reasonable factual basis for doubting Judge Edmunds' impartiality in this matter.

This Court is not persuaded by plaintiffs' argument. Upon a review of the record, this Court finds that there is no reasonable factual basis for doubting Judge Edmunds' impartiality in this action. The comments made by Judge Edmunds at the May 5, 1993 hearing were made in an attempt to explain the basis for her conclusion that a conflict of interest exists in this case, in light of the fact that plaintiffs' counsel is now a trustee for the community college which plaintiffs are suing in this action. In addition, while the Sixth Circuit has implicitly held that § 455 does not have a timeliness requirement,[7] this Court finds that the comments allegedly made by Judge Edmunds during the July 23, 1992 status conference do not create a reasonable factual basis for doubting Judge Edmunds' impartiality in this case. Therefore, it is the opinion of

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[7] *Easley*, 853 F.2d at 1356-58 (holding that § 144 motion was untimely, but remanding for further fact-finding on § 455 motion to disqualify district judge).

this Court that Judge Edmunds should not disqualify herself from this case under § 455.

IV. CONCLUSION

For all of the aforementioned reasons, plaintiffs' motion to disqualify Judge Edmunds is DENIED. This Court's limited participation in this matter is now completed.

IT IS SO ORDERED.

/s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Pursuant to Rule 77 FRCivP

COPIES HAVE BEEN MAILED TO
THE FOLLOWING:
Atty. Sue E. Radulovich
Atty. Daniel Bretz
Atty. Cynthia Adkison

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on July 5, 1993
R. P. Nastwold
DEPUTY CLERK